INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument:	
I. The underlying controversy is moot, and, in any event, the issues raised by the petition lack prospective importance	8
II. The decisions of the courts below were correct	11
Conclusion	13

CITATIONS

Cases:	
Chicago & Southern Air Lines v. *Waterman Steamship Corp.*, 333 U.S. 103	12
Consumers Union of U.S. v. *Kissinger*, 352 F. Supp. 1319, *affirmed in part*, 506 F. 2d 136	
DeFunis v. *Odegaard*, 416 U.S. 312	8, 9
North Carolina v. *Rice*, 404 U.S. 244	8
Roe v. *Wade*, 410 U.S. 113	8
South Puerto Rico Sugar Co. Trading Corp. v. *United States*, 334 F. 2d 622	13
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U.S. 498	9
United States v. *Belmont*, 301 U.S. 324	12
United States v. *Guy W. Capps, Inc.*, 204 F. 2d 655, affirmed on other grounds, 348 U.S. 296	13

574-015—75——1

Cases—Continued Page
United States v. *Pink*, 315 U.S. 203 12
United States v. *W. T. Grant Co.*, 345 U.S. 629 .. 9
United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 12
Statutes:
Sherman Act, Section 1, 15 U.S.C. 1 5
Trade Expansion Act of 1962, 76 Stat. 872, *et seq.*, 19 U.S.C. 1801–1991:
19 U.S.C. 1901 8
19 U.S.C. 1901(b)(1) 10
19 U.S.C. 1902 8
19 U.S.C. 1981 9
19 U.S.C. 1982 ..... 6, 9
Trade Act of 1974, Pub. L. 93–618, 88 Stat. 1978 8
Section 102 11
Section 107 11
Section 201(b) 10
Section 201(b)(2) 10
Section 202 11
Section 301 11
Congressional material:
H.R. Rep. No. 91–1435, 91st Cong., 2d Sess. (1970) 3
H.R. Rep. No. 93–571, 93d Cong., 1st Sess. (1973) 9

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1097

CONSUMERS UNION OF UNITED STATES, INC., PETITIONER

v.

HENRY A. KISSINGER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 506 F. 2d 136. The opinion of the district court (Pet. App. 30a-35a) is reported at 352 F. Supp. 1319.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1974, and a timely petition for rehearing was denied on December 2, 1974. The petition for a writ of certiorari was filed March 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the underlying controversy, a challenge to voluntary arrangements negotiated with foreign

producers, at the direction of the President, to restrain exports of steel into the United States, is now moot by reason of the expiration of the arrangements and the subsequent congressional revision of the statutory provisions which petitioner contends preempted the President's authority.

2. Whether the lower courts correctly held that congressional enactment of the Trade Expansion Act of 1962 occupied only the field of enforceable international trade agreements and did not preclude the President from negotiating the voluntary restraint arrangements.

STATEMENT

1. In 1968, in response to a serious problem posed by increasing steel imports into the United States, the Secretary of State, at the direction of President Johnson, negotiated arrangements with representatives of foreign steel producers under which those producers voluntarily undertook to limit exports of steel to the United States for a three-year period, ending December 31, 1971 (D.C. Cir. App. 119a–120a, 30a–35a).[1] Early in 1970, the State Department began considering the question of extending the voluntary arrangements for a limited period of time. The question of extension was submitted for review to the Under Secretaries Committee of the National Security Council, which recommended to the President that the exten-

[1] "D.C. Cir. App." refers to the joint appendix in the court of appeals, which has been furnished to this Court by petitioner.

sions be sought and suggested modified terms for the arrangements (D.C. Cir. App. 121a, 154a).[2] Following receipt of a directive from the President that extensions of the arrangements be sought, the State Department commenced negotiations with representatives of the Japanese and European steel industries, which now also included representatives of the British steel industry[3] (D.C. Cir. App. 122a). Following these negotiations, the arrangements were entered into for the period 1972–1974. These arrangements, which were the ones effective during the pendency of this action, were embodied in separate letters to the Secretary of State from representatives of the steel producers of the European Economic Community, including the United Kingdom, and the Japan Iron and Steel Exporters' Association, dated May 2, 1972, and May 4, 1972, respectively. Both letters were made public by a presidential statement on May 6, 1972. The arrangements expired by their own terms on December 31,

[2] In the course of reporting out proposed trade legislation during 1970, the House Ways and Means Committee formally requested the President to extend the voluntary steel arrangements. H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. 92 (1970) (D.C. Cir. App. 120a–121a, 153a–154a).

[3] During the course of these negotiations, State Department officials met with various domestic interests—including steel producers and importers, labor union officials, members of Congress, and other interested agencies of the Executive Branch, as well as representatives of petitioner Consumers Union—to obtain their views regarding the arrangements. During the negotiations, the State Department officials, while aware of the views of the various interested groups, spoke for and represented the policy judgments of the United States government alone (D.C. Cir. App. 122a–123a, 154a–156a).

1974 (D.C. Cir. App. 123a, 126a–145a, 147a–148a, 156a).

In examining the possible alternatives and deciding in favor of negotiating the temporary voluntary limitations with foreign steel producers, the President and his advisers took into consideration a broad range of factors: domestic economic problems, the impact of proposed protectionist legislation, the government's policy with respect to international trade and, most basically, the foreign relations of the United States. The principal objective was to develop a solution which would have the least adverse effect on our foreign trade and foreign relations (D.C. Cir. App. 117a–118a). The Executive Branch concluded that voluntary undertakings by foreign steel producers to limit their exports of steel mill products to the United States would provide the best solution. It was concluded that such a program would provide flexible limitations of limited duration, would have few implications for the treatment of other products, would not face the same danger of retaliation based upon the GATT as would unilaterally imposed quotas, and would therefore minimize or avoid a disruptive impact on the foreign relations of the United States (D.C. Cir. App. 117a, 151a).[4]

[4] The affidavit of Julius L. Katz, Deputy Assistant Secretary of State for International Resources and Food Policy, dated August 25, 1972, showed that the development of these arrangements avoided what could have been an abrasive situation between the United States and the nations whose steel producers undertook to limit exports. The governments of these nations had notice of the continuing negotiation of the arrangements and implicitly acquiesced in them. This acquiescence was manifested not

2. Petitioner filed suit in May of 1972 challenging the President's power to negotiate arrangements with foreign steel producers for a voluntary temporary limitation on their exports of steel to the United States and seeking declaratory and injunctive relief. The original complaint, brought against the Secretary and a Deputy Assistant Secretary of State and several foreign and domestic steel producers and associations, asserted two claims: (1) that all of the defendants, including the Secretary, were engaged in a conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and (2) that the President had exceeded his constitutional and statutory authority in negotiating and obtaining the voluntary arrangements, without adhering to the procedural requirements of the Escape Clause provisions of the Trade Expansion

---

only by the failure to object to these developments, but also by the fact that the steel producers involved have very close ties to, and in some cases are owned by, their respective governments. In the judgment of the State Department, any attempt to persuade other governments themselves to enter into export agreements would have adversely affected United States foreign relations. Moreover, foreign governments would have been reluctant to conclude such agreements directly because of their precedential effect with regard to other industries and commodities, because of the prospect of adverse political consequences, and because trade restrictions embodied in formal government-to-government agreements might tend to be more permanent. These foreign governments recognized, as the Executive Branch had concluded, that the voluntary arrangements represented the best solution to a situation which threatened to impair good trade relations between the United States and the other nations involved (D.C. Cir. App. 123a–124a).

Act of 1962, 19 U.S.C. 1982[5] (D.C. Cir. App. 10a–55a). After the State Department defendants filed a motion to dismiss the complaint or for summary judgment (D.C. Cir. App. 110a–111a), petitioner stipulated to the dismissal with prejudice of its claim of antitrust violation (D.C. Cir. App. 158a–161a). Petitioner then filed an amended complaint against all defendants limited to the issue of presidential power (D.C. Cir. App. 162a–192a).

The district court held that the President's constitutional foreign affairs power gave him concurrent authority to take action in the area of foreign commerce where Congress had not preempted the field.

[5] The opinion of the court of appeals contains a concise explanation of the operation of these provisions (506 F. 2d at 142; Pet. App. 7a):

"Title III of the Trade Expansion Act of 1962, recognizing that domestic interests of various kinds may be adversely affected by concessions granted under trade agreements, authorizes the making of compensating adjustments of various kinds. Section 301 (19 U.S.C. § 1901) provides that the Tariff Commission shall undertake investigations of injuries allegedly being done to domestic businesses or workers by such things as increased imports flowing from a trade agreement. After holding public hearings, the Tariff Commission shall make a report to the President. If it affirmatively finds injury to domestic industry, the President may under Section 351 increase or impose tariff duties or other import restrictions. 19 U.S.C. § 1981, or alternatively he may under Section 352 negotiate agreements with foreign governments limiting the export from such countries to the United States of the article causing the injury. 19 U.S.C. § 1981 [*sic*]. If this latter option is taken, the Act provides that the President is authorized to issue regulations governing the entry or withdrawal from warehouse of the article covered by the agreement."

The court went on to find that Congress had not preempted the field of non-enforceable, voluntary restraint arrangements with foreign producers, and thus upheld the President's authority to negotiate the arrangements at issue here (352 F. Supp. 1319; Pet. App. 30a–35a).

The court of appeals, one judge dissenting, affirmed, holding that the Trade Expansion Act of 1962, which only pervasively "occupied the field of *enforceable* import restrictions" (Pet. App. 8a, emphasis in original), did not preempt the matter of voluntary restraint agreements and that the President was therefore not precluded from negotiating these arrangements.

Judge Leventhal dissented on narrow grounds. While recognizing that the President possessed a degree of concurrent constitutional power in the foreign commerce field, he concluded that the arrangements were formal and enforceable enough to have been preempted by the Escape Clause provisions of the Trade Expansion Act.[6]

[6] The district court also issued declarations that the United States could not exempt these foreign producers from antitrust liability and that the arrangements were not exempted from the operation of the antitrust laws. The court of appeals ruled that these declarations were improper because there was "nothing in the record that shows the Executive as purporting to grant such an exemption * * *" (Pet. App. 5a) and because petitioner had abandoned this claim by voluntarily dismissing its antitrust count (Pet. App. 6a). Petitioner has disclaimed any interest in pursuing these antitrust issues, and they are not presented by the petition for certiorari (Petition, p. 6).

ARGUMENT

I. THE UNDERLYING CONTROVERSY IS MOOT, AND, IN ANY EVENT, THE ISSUES RAISED BY THE PETITION LACK PROSPECTIVE IMPORTANCE

As petitioner recognizes (Petition, p. 9 at n. 9), the challenged arrangements expired by their own terms on December 31, 1974, after the ruling of the court of appeals and more than two months before the petition for certiorari was filed. It is, of course, axiomatic that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice,* 404 U.S. 244, 246; see *DeFunis* v. *Odegaard,* 416 U.S. 312. Moreover, "an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade,* 410 U.S. 113, 125.

Here, not only have the arrangements expired, they have no continuing collateral consequences affecting either private parties or the government. Moreover, subsequent to the decisions below, Congress repealed or amended the principal sections of the trade laws relied upon by petitioner as prompting the exercise of presidential power in this case. Accordingly, no live controversy presently exists. Enactment of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978, has brought into being a statutory framework substantially different from that which prevailed in 1972, when the voluntary restraint arrangements at issue were concluded. The Escape Clause provisions of the Trade Expansion Act of 1962 (19 U.S.C. 1901, 1902,

1981, and 1982) have been superseded; a new Escape Clause mechanism with different procedures and remedies has been established in the Trade Act of 1974.[7] Thus no repetition of the preemption issue here present can occur and the case does not fall within the exception to the mootness doctrine that allows review of short-term activities, "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515.[8]

In view of the expiration of the agreements and petitioner's dependence on the old Escape Clause procedure, the statutory amendment should be dispositive. The dissenting judge in the court of appeals recognized that restraints on foreign commerce involve a "continuum," that the President has undoubted authority over actions falling at the less restrictive end of that continuum (Pet. App. 14a, 17a), and that "[t]his is the critical question in the case—where to draw the line" (*ibid.*). In the present posture of this case, with the arrangements having expired and the

[7] The House Ways and Means Committee noted in its report on H.R. 10710, the Trade Reform Act of 1973, that the Escape Clause provisions of the Trade Expansion Act of 1962 were the subject of a "major revision." H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 44 (1973).

[8] Petitioner also cites cases which hold that voluntary cessation of illegal conduct does not moot a case. *United States* v. *W. T. Grant Co.*, 345 U.S. 629. That line of authority is inapplicable since the parties to the arrangements did not withdraw from them to prevent a judicial decision; they won a declaration of legality, and the arrangements then expired automatically after having been in effect for a full six years, in one form or another. Cf. *DeFunis* v. *Odegaard*, *supra*, 416 U.S. at 318.

Escape Clause having been revised, that process of line drawing with respect to a superseded statute does not merit review by this Court.

The Escape Clause mechanism in the Trade Act of 1974, in substantial respects, differs from the earlier statute. First, the requirement of 19 U.S.C. 1901(b)(1) that increased imports injuring domestic industry result in "major part" from trade concessions was dropped; such injury need no longer result from concessions granted by the United States in trade agreements. The record in this case makes it clear that a reason the government did not consider granting Escape Clause relief in 1972 was that the injury to the steel industry was not concession-related (D.C. Cir. App. 116a). Second, subsection (b) of Section 201 of the 1974 Act makes more liberal the standards for determining injury to a domestic industry because of increased imports from abroad. Where the former law conditioned relief upon a finding that increased imports were in such quantities as to "cause, or threaten to cause, serious injury," the 1974 Act establishes a less strict criterion in providing that the International Trade Commission determine only that increased imports are such as to be a "substantial cause of serious injury, or the threat thereof, to the domestic industry." Third, the Trade Act of 1974 contains a provision (Section 201(b)(2))—entirely new to Escape Clause procedures—which directs the International Trade Commission to take into account all relevant economic factors in making

determinations relating to serious injury or the threat thereof, and sets out a non-exclusive list of such factors. Finally, the Trade Act of 1974 (Section 202) expressly directs the President to provide import relief, after the International Trade Commission has determined that imports are a substantial cause of serious injury, or threat thereof, to a domestic industry, unless he determines that provision of import relief is not in the national economic interest of the United States.[9] Thus, the complicated constitutional issues raised by petitioner cannot again arise in the legal context presented by this case, if at all.[10]

II. THE DECISIONS OF THE COURTS BELOW WERE CORRECT

It has long been recognized that the President has constitutional authority in connection with his power over foreign affairs to seek voluntary export limita-

[9] Moreover, the new trade law contains other provisions which might conceivably have applied to the factual situation which the government faced in 1968 and 1972, and which might have made it unnecessary for the government to seek voluntary arrangements. See Pub. L. 93–618, Sections 102 and 107 (authorizing agreements to reduce non-tariff barriers to and other distortions of international trade, including agreements which permit use of temporary measures to ease adjustment to changes occurring in domestic markets), and Section 301 (authorizing presidential action in response to unfair trade practices by foreign countries).

[10] Moreover, as petitioner's own factual statement makes clear, the original 1968 arrangements and the 1972 extensions all had a duration of three years, ample time for review in situations presenting a live controversy. In this respect, it should be noted that the petitioner did not file its law suit until well after the initial arrangements had expired and the 1972 extensions had become effective and then did not elect to proceed by motion for preliminary injunction or other expedited procedure.

tions of the type at issue here. His foreign relations power extends to issues relating to foreign trade. As this Court held in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, the fact that Congress has concurrent constitutional power with respect to foreign commerce does not preempt the President from exercising his own foreign relations power in that area.[11]

The 1962 Trade Expansion Act gave the President additional authority, beyond his constitutional foreign affairs power, to negotiate government-to-government agreements, enforceable at the Customs House, when trade concessions had seriously injured domestic industries. That legislation was in no way designed to limit the President's power of persuasion and negotiation with entities other than governments—"jawboning" as Judge Danaher, concurring, characterized it below (506 F. 2d 145; Pet. App. 10a)— to achieve less formal and less restrictive resolutions of trade problems than those embodied in the Act. The procedural requirements of the Trade Expansion Act's Escape Clause thus had no application to the Presi-

[11] See also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542; *United States* v. *Pink*, 315 U.S. 203, 222-223, 229-230; *United States* v. *Belmont*, 301 U.S. 324, 330.

dent's actions in negotiating these arrangements with foreign producers to limit steel exports.[12]

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

IRWIN GOLDBLOOM,
Deputy Assistant Attorney General.

MORTON HOLLANDER,
DAVID J. ANDERSON,
Attorneys.

MAY 1975.

---

[12] Nor does the opinion below represent any conflict with the decision of the Fourth Circuit in *United States* v. *Guy W. Capps, Inc.*, 204 F. 2d 655, affirmed on other grounds, 348 U.S. 296, which denied judicial enforcement to an executive agreement with Canada respecting the importation of potatoes. Even assuming that the *Capps* decision has continuing vitality, see *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 334 F. 2d 622, 634 n. 16 (Ct. Cl.), it has no application here. *Capps* is an example of an attempt by the Executive Branch to impose sanctions in the foreign trade area without the benefit of legislation. It is simply not relevant to the type of voluntary, unenforceable arrangement, obtained through the use of presidential diplomacy, that was involved here.

U.S. GOVERNMENT PRINTING OFFICE: 1975